

<b>STATE OF SOUTH CAROLINA</b>	)	<b>BEFORE THE CHIEF PROCUREMENT OFFICER</b>
<b>COUNTY OF RICHLAND</b>	)	
	)	DECISION
In the Matter of Protest of:	)	
	)	CASE No. 2010 - 107
	)	
SuperFlow Technologies Group	)	
	)	
	)	
Greenville Technical College	)	POSTING DATE: May 21, 2010
IFB No. GTC-10-017	)	
<u>Transmission Dynamometer</u>	)	MAILING DATE: May 21, 2010

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from SuperFlow Technologies Group (SuperFlow) filed March 19, 2010. In this procurement, Greenville Technical College (GTC) attempts to procure a transmission dynamometer with an invitation for bids (IFB). In its letter, SuperFlow protests GTC's intent to award to Ganzcorp Investments, Inc. d/b/a Mustang Advanced Engineering (Mustang) pursuant to Section 11-35-4210(1)(b) of the South Carolina Consolidated Procurement Code (Code).

Since the issues to be decided are clear, this decision is prepared without the benefit of a hearing.

### **NATURE OF PROTEST**

SuperFlow's protest letter stated, in pertinent part, "SuperFlow Technologies Group is formally filing a protest against the award of bid #GTC-10-017. It is our belief, based on over 30 years of experience that your specifications are to [sic] open to interpretation to allow for a fair bidding process." As its basis for protest, SuperFlow identified the following specifications at issue:

- Adaptation
- No spec's on input and output torque requirements (+/-)
- Item 3 – Control computer – not defined
- Item 4 – Operator display – not defined
- Flow meter – what's the range

- Input speed – min max
- Output speed – min max RPM
- Output torque – min max requirement
- Shift test what is it to be
- Simulation control – please define
- Student assign task software – what is this?
- Item 18 – what are other parameters/ Not defined
- Solicitation requires manual transmission test capability – how is this to be accomplished, Clutch mechanism, drive stop mode or something else?
- Spec limited competition

This letter of protest is attached and incorporated herein by reference in its entirety.

### **FINDINGS OF FACT**

The following dates and facts are relevant to the protest:

1. On February 8, 2010, GTC issued the IFB and advertised the solicitation in *South Carolina Business Opportunities* (SCBO).
2. On February 12, 2010, GTC issued the only amendment, Amendment #1, which answered questions received from prospective bidders. It also extended the bid opening from February 24, 2010 until March 2, 2010.
3. On February 26, 2010, SuperFlow filed a formal protest of the bid specifications via email to the CPO. On this same date, SuperFlow attempted to recall the email.
4. SuperFlow formally withdrew that protest on March 1, 2010.
5. On March 2, 2010, GTC opened the bids received, which reflected the following bid amounts:

<u>Bidder</u>	<u>Bid Amount</u>
Mustang	\$92,900
SuperFlow	Offer marked “confidential” <sup>1</sup>

6. On March 5, 2010, SuperFlow emailed GTC indicating it was “considering” filing a protest of the award but did not do so on that date.

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<sup>1</sup> Declaring a bid price “confidential” when submitting a response to an IFB violates of S.C. Code Ann. § 11-35-410.

7. GTC posted a notice of intent to award to Mustang on March 9, 2010.
8. SuperFlow filed this protest, which is before the CPO, on March 19, 2010.
9. On April 16, 2010, the CPO notified the parties of a hearing scheduled for May 5, 2010.
10. On April 30, 2010, GTC submitted a motion asking the CPO to dismiss the protest as untimely filed because it challenged the specifications. Mustang joined in the motion to dismiss.
11. On May 4, 2010, SuperFlow informed the CPO that they would not be attending the hearing. The CPO subsequently cancelled the hearing.

### **CONCLUSIONS OF LAW**

GTC and Mustang have moved to dismiss SuperFlow's protest. Specifically, they argue that SuperFlow's protest is untimely because it challenges the specifications, not the award.

The Code provides two opportunities to protest. First, S.C. Code Ann. § 11-35-4210(1)(a) provides rights to prospective bidders who are aggrieved by the solicitation's requirements stating:

A prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(a) within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment to it, if the amendment is at issue. An Invitation for Bids or Request for Proposals or other solicitation document, not including an amendment to it, is considered to have been issued on the date required notice of the issuance is given in accordance with this code.<sup>2</sup>

Second, S.C. Code Ann. § 11-35-4210(1)(b) allows actual bidders the following rights when aggrieved by the intended award of a contract:

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of

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<sup>2</sup> This information was also included in the IFB on page five.

intent to award, whichever is earlier, is posted in accordance with this code; **except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.** [Emphasis added]

The South Carolina Procurement Review Panel (Panel) has agreed that a prospective vendor must protest allegedly defective specifications within the time limits of Section 11-35-4210(1)(a) and may not wait until he loses the contract to complain. See Protest of the Computer Group, Case No. 1992-6. In other words, a matter that could have been raised as a protest of the solicitation may not be raised as a protest of the intended award of a contract. SuperFlow's protest letter clearly protests only the specifications; SuperFlow stated no grounds of protest regarding the intended award. The IFB was issued on February 8, 2010, and the specifications were apparent in the original solicitation. Further, Amendment One, which addressed some specifications, was issued on February 12, 2010. Therefore, any protest of the solicitation was due by no later than March 1, 2010. However, SuperFlow's letter of protest was filed on March 19, 2010, which was well beyond the time required by the Code.

In opposition to the motion to dismiss, SuperFlow attempts to dispute that its protest is untimely by arguing a GTC employee had provided it with erroneous information on where to locate notice of the solicitation. Specifically, SuperFlow communicated with B.J. Hart-Landers, a procurement specialist at GTC, over four months before this procurement was issued. Believing the procurement would be handled by the Materials Management Office (MMO) due to its size and being unaware of when it would be processed, Ms. Hart-Landers indicated SuperFlow could watch for the solicitation on

the State's procurement information center website under MMO solicitations.<sup>3</sup> However, SuperFlow argues it was not posted at the location given by Ms. Hart-Landers.

First, SuperFlow's own actions reflect that it had notice of the solicitation within a reasonable time in order to exercise its protest rights and submit a bid. As stated previously, SuperFlow has acknowledged it was aware of the solicitation by February 26, 2010, which was within the 15 day period to challenge the solicitation, and clearly had sufficient means to timely challenge the specifications. In fact, SuperFlow **did** file a timely protest of the solicitation on that date. However, SuperFlow chose to withdraw that protest on March 1, 2010, thereby foreclosing itself from protesting the specifications under the Code.<sup>4</sup> Further, SuperFlow submitted a bid by the opening date.

Regardless, the solicitation was properly advertised in SCBO on February 8, 2010. Pursuant to § 11-35-1520(3), "[a]dequate notice of the invitation for bids must be given at a reasonable time before the date set forth in it for the opening of bids." This Code section further specifies that advertising the solicitation in SCBO constitutes proper notice. *Id.* Regulation 19-445.2040 also identifies SCBO as the official state government publication to list proposed procurements. Since the procurement was advertised in SCBO within a reasonable timeframe, SuperFlow had adequate notice of the solicitation.

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<sup>3</sup> Specifically, Ms. Hart-Landers provided, in relevant part, the following email to SuperFlow on September 23, 2009, "The link for accessing the SC state solicitations is <http://www.procurement.sc.gov/>. Once you open this web page, in the "online solicitations" column click on "Goods and Service Solicitations". Then click the "here" link under current solicitations. On the next page you can scroll through the solicitation descriptions for the dyno solicitation..." See footnote below for further explanation.

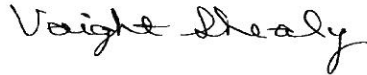
<sup>4</sup> Since SuperFlow voluntarily withdrew its protest dated February 26, that protest is not before the CPO, and the CPO has no jurisdiction to rule on it.

Moreover, even if Ms. Hart-Landers' directions were erroneous<sup>5</sup>, the Panel has held that estoppel is not warranted against the State where the unauthorized or erroneous conduct or statements by an employee were relied upon by a vendor. Protest of Technology Solutions, Case No. 2001-3 (finding a vendor could not argue that the State was estopped from arguing the procurement was unauthorized when vendor improperly relied on an employee's statement rather than the applicable law). The South Carolina Supreme Court has also stated, "estoppel will not lie against a government entity where a government employee gives erroneous information in contradiction of statute. Simply stated, equity follows the law." Quail Hill, LLC v. County of Richland, -- S.E.2d --, 2010 WL 1027911 (S.C.) citing Morgan v. South Carolina Budget and Control Board, 377 S.C. 313, 659 S.E.2d 263 (Ct. App. 2008). The Panel has also stated, "[p]rotestants are charged with knowing the law, regardless of whether State Procurement advises them of it correctly, or at all." Protest of Olsten Services, Case No. 1990-16 (finding that where procurement officer mistakenly failed to send incumbent vendors a copy of the IFB, the incumbents were still on notice of the mandates in the Code "because the right to protest and the mandatory time limits are set forth plainly in § 11-35-4210(1) for anyone who chooses to read it"); See also, Protest of Oakland Janitorial Service, Case No. 1988-13 (holding that even if a State official had misled the vendor the vendor was charged with knowing its rights under the law). As a vendor, SuperFlow was required to know that the only notice required by the Code was advertisement in SCBO.

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<sup>5</sup> Although the better practice would have been to direct the vendor to the SCBO publication on the MMO website at [www.mmo.sc.gov](http://www.mmo.sc.gov), where it would have been published either way, the directions provided by Ms. Hart-Landers were not erroneous at the time given. SuperFlow could have accessed the solicitation at the location provided by Ms. Hart-Landers had MMO processed the procurement. However, in January 2010, Bill Tripp, the buyer at GTC responsible for the solicitation, requested this CPO delegate him the authority to process and award the procurement, and his request was granted. As a result of the delegation, the solicitation was not listed under this particular section of the procurement information center website because it was processed by GTC. However, the solicitation was advertised in SCBO as stated above, which is provided on MMO's website but can be accessed on the procurement information center website as well.

Since all of the grounds in SuperFlow's protest concern the specifications, SuperFlow's protest was filed beyond the time allowed by the Code. Therefore, the motions to dismiss the protest as untimely are granted. SuperFlow's protest is hereby dismissed.



R. Voight Shealy  
Chief Procurement Officer  
for Supplies and Services

May 21, 2010

Date

Columbia, S.C.



## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: [www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2009-2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 23, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).





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March 19, 2010

To Whom It May Concern:

After a review of the bid specification and answer to questions SuperFlow submitted to Greenville Technical College (GTC), SuperFlow Technologies Group is formally filing a protest against the award of bid #GTC-10-017.

It is our belief, based on over 30 years of experience that your specifications are to open to interpretation to allow for a fair bidding process. Below is a portion of the questions and answers submitted for clarification with our basis for protests noted in bold black text:

**Adaptation**

GM, Nissan and Toyota vehicles

**GM adapters for a machine of this size could include light duty Allison transmissions. Assuming this was the case we submitted a price that included Allison adaptation. To bid this accurately all bidders must know make, model and year of all transmissions desired to be tested.**

No spec's on input and output torque requirements (+/-)

The committee looked at the different motors on the market and the different 40hp motors seem to meet their needs

**This question is referring to torque measurement requirements. The ability to measure input and output torque is critical to achieve an accurate test. Without specifications as to how and how much or little torque one wants to measure a vendor could supply a simple torque wrench or a sophisticated computer based torque measurement system. Again this specification is to open to interpretation.**

Item 3 – Control computer – not defined

Simply a computer with an operating system

**This answer leaves us still wondering what then GTC is expecting vendors to supply. Based on this answer we could simply ship you a new Dell Laptop with no software or hardware system to run and monitor your dyno and perform a test on a transmission.**

Item 4 – Operator display – not defined

Simply a way to monitor

**Monitor what? Again this requirement is too vague to provide for a fair bid competition.**

Flow meter – what's the range

This is determined by the manufacturer

**This should be determined by the end user based on what transmission they desire to test.**

Input Speed – min max

This is determined by the manufacturer

Output speed – min max RPM

This is determined by the manufacturer

Output torque – min max requirement

This is determined by the manufacturer

Shift test – what is it to be

This is determined by the manufacturer

**All statements above that indicate “determined by manufacturer” leave too much open to interpretation. One manufacturer may believe you need to test to new factory OEM end of line test specification and another may believe you only need to do a simple, no load spin test. A machine to test to OEM levels would cost five to six times as much as a simple spin tester.**

Simulation control – please define

Simply simulating the vehicle

**We ask simulating the vehicle doing what, coasting down hill, pulling a trailer, full acceleration? Again the lack of definition leaves too much open to conduct a fair bid process.**

Student assign task software – what is this?

Software that stores the results of the students outcome that are assigned to them

**This leaves us wondering why this was not better defined in the solicitation. Again too vague**

Item 18 – what are other parameters? Not defined

The committee would like the builder or supplier to determine this

**Again to reinforce our point, because the spec is ambiguous we submitted bid for fully automated test capability, Mustang's bid does not indicate clearly fully automated testing. Additionally Mustang offers 4 pressure taps we offered 8 pressure taps. You can not test all pressures in some of the transmission in the families you requested with only 4 pressure taps.**

Solicitation requires manual transmission test capability – how is this to be accomplished, Clutch mechanism, drive stop mode or something else?

The clutch mechanism is not needed because the motor is electric. It can be stopped and started in any gear.

**This should have been better defined, one manufacturer could bid a fully automated clutch option while another bids a motor interrupt switch.**

Spec limited competition

Oil cart – can't use frame for ATF storage

The committee wanted to be able to change the different types of fluid easily

**We believe this requirement was an attempt to limit competition by eliminating a standard option on our equipment. An oil cart adds extra cost and is not needed. In addition and most importantly all transmissions listed in your solicitation can be tested using the same oil.**

In conclusion we believe GTC deserves to receive a transmission dynamometer suited to their needs and this solicitation could lead to you receiving less than adequate equipment. We have supplied hundreds of dyno's of this nature to Technical Colleges for over 30 years. We would offer to assist GTC with developing a fair solicitation and or provide references at other schools that could assist with this.

Thank you for you consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Giles". The signature is fluid and cursive, with the first name "Scott" and last name "Giles" clearly distinguishable.

Scott Giles  
CEO